(3)

Supreme Court, U.S.
FILED
AUG 22 1994
OFFICE OF THE CLERK

No. 93-2045

In The
SUPREME COURT of the UNITED STATES

October Term, 1993

JAMES CITY COUNTY, VIRGINIA,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
U.S. ARMY CORPS OF ENGINEERS,
Respondents.

Brief for the City of Colorado Springs, CO and the Metropolitan Water Providers and Participants as *Amici Curiae* Supporting Grant of the Petition for Writ of Certiorari

---

MARK T. PIFHER
Counsel of Record
ANDERSON,
GIANUNZIO,
DUDE, PIFHER
& LEBEL, P.C.
104 S. Cascade Ave. # 204
Colorado Springs,
CO 80901
(719) 632-3545

Attorney for *Amicus*
City of Colorado Springs

MARCIA M. HUGHES
MARCIA M. HUGHES, P.C.
390 Union Blvd., # 415
Lakewood, CO 80228
(303) 980-8668

Attorney for *Amici*
The Metropolitan Water
Providers and The
Metropolitan Water
Participants

25pp

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency, having long interpreted § 404(c) of the Clean Water Act to require consideration of whether a "practicable" alternative to a project is or is not available, may ban construction of a public water supply reservoir without ever considering a final judicial determination that no "practicable" alternative exists?

2. Whether the Environmental Protection Agency's finding that placing fill for the Ware Creek Reservoir would cause "unacceptable" effects is entitled to undiminished deference notwithstanding that: (a) the Agency's original finding was judicially invalidated as wholly without record support, (b) the Agency quickly reached the same result on remand without any important change in the administrative record, and (c) the Agency's finding is contradicted by those of other federal and state agencies sharing similar authority under the same statute to ban Reservoir construction for the same reasons?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF THE AMICI 1

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THIS COURT SHOULD DECIDE WHETHER SECTION 404(c) ALLOWS EPA TO IGNORE AN APPLICANT'S NEEDS AND THE LACK OF ANY PRACTICABLE ALTERNATIVE MEANS OF MEETING SUCH NEEDS 8

A. This is an Important Federal Question 9

B. Congress Provided No Clear Statement That EPA Could Ignore Local Needs in the Absence of Viable Alternatives .. 11

C. EPA Must Adhere to Longstanding Policies 14

TABLE OF CONTENTS - continued

Page

II. COURTS NEED NOT DEFER TO FEDERAL AGENCY FINDINGS UNDER SUCH CIRCUMSTANCES 14

A. Minimal Deference Is Due the EPA Determination 15

B. EPA Bears the Burden of Proof . 15

C. EPA's Decision Merits an Especially Close Examination ... 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Case Law

Alameda v. Browner, C.A. No. 91-M-2047, (D. Colo. 1991) 5
Barnard v. Carey, 60 F. Supp. 539 (N.D. Ohio 1945) 15
Bersani v. Robichaud, 850 F.2d 36 (2nd Cir. 1988) 15, 17
California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 1, 2
Camp v. Pitts, 411 U.S. 138 (1973) 10
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 14
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 10, 15, 17
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 2
Colorado v. New Mexico, 467 U.S. 310 (1984) 2
EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980) 15
Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 10
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 15
Gregory v. Ashcroft, 111 S.Ct. 2395 (1991) 8, 11
Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (D.C. Cir. 1989) 17
Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515 (10th Cir. 1992) 4

TABLE OF AUTHORITIES - continued

Page

Illinois Central R.R. v. Public Utilities Comm'n of Illinois, 245 U.S. 493 (1918) 13
James City County, Virginia v. EPA, 955 F.2d 254 (4th Cir. 1992) 16
Nebraska v. Wyoming, 325 U.S. 589 (1945) 2
Pennzoil Co. v. FERC, 789 F.2d 1128 (5th Cir. 1986) 17
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13
Rust v. Sullivan, 500 U.S. 173 (1991) 8, 14
Ohio v. EPA, 997 F.2d 1520 (D.C. Cir. 1993) 14
Sullivan v. Stroop, 496 U.S. 478 (1990) 9
United States v. District Court for Eagle County, 401 U.S. 520 (1971) 2
United States v. New Mexico, 438 U.S. 696 (1978) 2, 3
United States v. Northern Colorado Water Conservancy Dist., 608 F.2d 422 (10th Cir. 1979) 3
United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899) 2
Wyoming v. Colorado, 259 U.S. 419 (1922) 2, 3

Statutes and Regulations

5 U.S.C. § 556(d) (1977 & Supp. 1994) 17
Clean Water Act
33 U.S.C. § 1251 (1986 & Supp. 1994) 13
33 U.S.C. § 1251(b) (1986) 9
33 U.S.C. § 1251(g) (1986) 2

TABLE OF AUTHORITIES - continued

Page

33 U.S.C. § 1252 (1986) 13
33 U.S.C. § 1252(a) (1986) 9
33 U.S.C. § 1344 (1986 & Supp. 1994) 4, 9
33 U.S.C. § 1344(c) (1986) 9, 16
33 U.S.C. § 1370 (1986) 10
40 C.F.R. § 231.1(a) (1993) 17
43 U.S.C. § 666 (1986) 2
44 Fed. Reg. 58076, at 58080 (1979) 17
45 Fed. Reg. 85336, at 85338 (1980) 17
Water Administrative and Adjudication Act
C.R.S. §§ 37-92-101, et seq. (1990 & Supp. 1993) 2
Guidelines for Specification of Disposal Sites for Dredged or Fill Material
33 U.S.C. § 1344(b)(1) (1986) 16
40 C.F.R. §§ 230.1(c), 230.10(a)(3) (1993) 16
44 Fed. Reg. 5876, 5878 (1979) 14

Miscellaneous

B. Schwartz, Administrative Law § 10.35 at 664 (2nd Ed. 1984) 15
Colorado Constitution, Article XVI, Sections 5 and 6 2
Hobbs and Railey, "Water Rights Protection and Water Quality Law," 60 *Univ. Colo. L. Rev.* 841 (1989) 3
Lawrence Tribe, American Constitutional Law, §§ 5-8 at 316-17 (1988) 13

No. 93-2045

In The
SUPREME COURT of the UNITED STATES

October Term, 1993

JAMES CITY COUNTY, VIRGINIA,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
U.S. ARMY CORPS OF ENGINEERS,
Respondents.

Brief for the City of Colorado Springs, CO and the Metropolitan Water Providers and Participants as *Amici Curiae* Supporting Grant of the Petition for Writ of Certiorari

INTERESTS OF THE AMICI

Counsel for the parties to this litigation have consented to the filing of this amicus brief by the City of Colorado Springs, Colorado, and the Metropolitan Water Providers and Participants (herein the "City" and the "MWP"). Letters from counsel for the parties are on file with the Clerk of this Court. The City and the MWP submit this brief in support of the Petitioners' request for grant of a Writ of Certiorari.

As this court is well aware, long ago Congress severed the waters upon the public domain from the lands, and conceded that rights to the use of water were to be determined under state law. *California Oregon Power Co.*

v. Beaver Portland Cement Co., 295 U.S. 142 (1935); *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899); *United States v. New Mexico*, 438 U.S. 696 (1978). Colorado chose to be governed by the doctrine of prior appropriation as set forth in the Colorado Constitution, Article XVI, Sections 5 and 6, and Colorado statutes, primarily the 1969 Water Rights Administration and Adjudication Act, C.R.S. §§ 37-92-101, et seq. (1990 & Supp. 1993). In addition, Colorado has participated in nine interstate compacts and several equitable apportionment cases. See e.g., *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922).[1]

Section 101(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1251(g) (1986), provides that the authority of each state to allocate quantities of water shall not be superseded, abrogated or otherwise impaired by the provisions of the CWA. In addition, the Act is not to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies are directed to cooperate with state and local agencies "to prevent, reduce and eliminate pollution in concert with programs for managing water resources." Hence, the CWA is an exercise in fundamental federalism. It establishes a national program of water quality control which is implemented on a state by state basis and designed to protect identified beneficial uses. It therefore should support, and not undermine, the allocation, administration and development of each state's allocated water resource.

---

[1] Colorado is also the home of the McCarran Amendment cases which interpret and apply the provisions of 43 U.S.C. § 666 (1986) governing the joinder of the United States water rights claims in state forums. See *United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

See generally, Hobbs and Railey, "Water Rights Protection and Water Quality Law," 60 *Univ. Colo. L. Rev.* 841 (1989).

The Front Range of Colorado, east of the Continental Divide, is semi-arid and receives annual precipitation of only twelve to fifteen inches. As is true with other Western states carved out of the public domain by settlement policies fostered by the federal government, see *United States v. New Mexico*, 438 U.S. 696 (1978), Colorado's strength and well-being is directly dependent on its ability to store spring snowmelt high in the watershed, to divert directly from streams at times of greatest flow, and to release from storage when such flows decline to low levels. Without reservoir storage and releases, it could not meet the year round water demand of cities, businesses, and farms. However, even such in-basin storage is often times inadequate, and hence East Slope municipalities must rely in part on supplemental transmountain diversions from Colorado's Western Slope. See *United States v. Northern Colorado Water Conservancy Dist.*, 608 F.2d 422 (10th Cir. 1979). Colorado's hydrologic cycle, and the key role of water storage and development in the Western states was addressed by this Court in *Wyoming v. Colorado*, 259 U.S. 419, 457-458 (1922).

The City of Colorado Springs is the second largest municipal entity in the State of Colorado. It is located on the Eastern Slope, approximately sixty miles south of Denver. Colorado Springs receives only fifteen inches of rain per year, and is not located adjacent to any major river system. Local water supplies, both surface and groundwater, are inadequate to meet its domestic supply requirements. Therefore, the City imports water from the Arkansas drainage to the east and south of the City, and engages in transbasin diversions from the Colorado River drainage, which is west of the Continental Divide. As noted above, the City depends upon the storage of winter

snowmelt in its numerous reservoirs, and the transport of those supplies to the City as demands warrant. In addition to its extensive water storage and delivery system, the City also owns and operates gas, electric and wastewater utility systems.

In the construction of its water storage and delivery facilities, and at times in meeting its other municipal obligations, the City has found it necessary to secure § 404 permits, 33 U.S.C. § 1344 (1986 & Supp. 1994). See, e.g. *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515 (10th Cir. 1992). Additional permits will be required in the future as the City water system expands and existing facilities are modified. The ability of the City to obtain such permits, free of unwarranted actions by federal regulatory agencies, is of paramount interest to the City as it prepares to meet future water supply and other infrastructure needs.

The Metropolitan Water Providers and Participants ("MWP") are an association of over twenty (20) local governments and quasi-local governments working together to develop water supplies for the greater metropolitan Denver, Colorado, area. The MWP membership is made up of both large and small cities as well as water and sanitation districts. The cities include the City of Aurora, the third largest city in the state of Colorado with a population of 235,381. Other city and county members include Adams County, the City of Arvada, the City of Broomfield, the City of Glendale, the City of Littleton, the City of Sheridan, the City of Lakewood, and the City of Thornton. Member water and sanitation districts include: Alameda Water & Sanitation District, Bear Creek Water & Sanitation District, Centennial Water & Sanitation District, Cherry Creek Valley Water & Sanitation District, Green Mountain Park Water & Sanitation, Havana Water & Sanitation District, Lakehurst Water & Sanitation District, Platte Canyon

Water & Sanitation District, South-East Englewood Water District, Southgate Water District, Southwest Group, Southwest Metro Water & Sanitation District, Valley Water District, Wheat Ridge Water District, and Willows Water District.

Members of the MWP are located on the Eastern Slope of Colorado and constantly must deal with the consequences of surviving in a semi-arid, water short state. The MWP members import water from the Colorado River and the Arkansas River. The ability of the MWP to provide water to their constituents is dependent on adequate storage of winter snowmelt. Members of the MWP hold Section 404 permits issued pursuant to the federal Clean Water Act.

The MWP are acutely aware of the Section 404(c) veto process under the Clean Water Act. They worked closely with the City and County of Denver in an effort to seek a federal 404 permit for Two Forks Dam and Reservoir, which was vetoed by the EPA pursuant to § 404(c) of the Act on November 23, 1990. EPA exercised its veto authority even though the Corps had announced it was ready to issue the permit after an exhaustive eight-year review process which cost approximately forty (40) million local government dollars.[2]

The Two Forks process reflected extensive local government collaboration. Recognizing the value, including the environmental benefits, of cooperation in a single project, numerous local governments and quasi-local governments throughout a six county region in the Denver metropolitan area spent years negotiating an intergovernmental contract allowing them to jointly develop a water project. Beginning in 1982, the MWP joined with the City

---

[2]The veto has been challenged in *Alameda v. Browner*, C.A. No. 91-M-2047 (D. Colo. 1991).

and County of Denver to seek necessary federal permits for the project.[3]

Included among the federal requirements was the need to obtain a § 404 permit. The permit was to be for a 100% locally funded water supply project and would serve over half the population of the state of Colorado. In deciding to issue the Section 404 permit after years of hard work and extensive review, the Corps concluded that the public needed a reliable and safe water supply and that Two Forks was the most practicable alternative.

In addition to the Corps' approval, the project had been accepted, as mitigated, by the U.S. Fish and Wildlife Service, the Governor of Colorado, and numerous state agencies, including the Colorado Division of Wildlife and the Colorado Department of Health, the latter having issued a Section 401 certificate. The Forest Service was in its final permitting stage.

At the last minute, new EPA Administrator, William Reilly, after only six weeks in office, intervened and directed EPA's Regional Administrator to initiate a veto action under § 404(c) of the Clean Water Act. EPA stated that it vetoed Two Forks, in part, because it found three purportedly practicable alternatives.[4]

In finding that these alternatives existed, EPA changed the project purpose identified by the permit applicants, once again dictating local government decisions. EPA's approach thus leaves local governments unable even to decide why they file a permit application.

---

[3]This joint effort to develop a regional project was a significant change for Colorado municipalities. In the past, the entities had fought each other, at great cost to their constituents.

[4]However, EPA did not find that the practicable alternatives it named were permittable.

At the same time that the full financial responsibility for developing these facilities falls on local entities, EPA is attempting to constrain local water supply options in an unwarranted fashion. If EPA's actions, such as its decisions in the Ware Creek and Two Forks matters are upheld, EPA will become the sole arbiter as to whether local infrastructure projects, such as vital water resource facilities, can in fact be developed. Each of the last five EPA veto actions has involved a public water resource project. Those actions include James City County's Ware Creek project (twice), Two Forks, Lake Alma in Georgia and Big River in Rhode Island. If the principles of federalism are to mean anything, it is essential that some balance be maintained, with deference to local determinations upon matters of vital local interest.

The City and the Metropolitan Water Providers and Participants have become increasingly concerned with (1) the use of federal water quality laws to undermine state water allocation principles and decisions, and (2) the unwarranted deference paid to EPA determinations in the face of contrary findings by state and local governmental entities with a more thorough understanding of the site specific issues and the consequences of the decisions being made. The Fourth Circuit decision being challenged by James City County continues this trend toward federal usurpation of state and local prerogatives. It is contrary to existing law and sound public policy and must be reversed.

SUMMARY OF ARGUMENT

Allowing EPA to veto a public water supply project in the absence of a viable alternative is contrary to the clearly expressed intent of Congress under the Clean Water Act. Congress desired to protect the nation's waters for purposes of preserving those waters for this

very use, i.e., domestic consumption, while deferring to state and local determinations regarding the location and timing of that use. This is apparent from §§ 101, 102 and 510 of the Act. Had Congress intended to usurp, under its Commerce Clause authority, the power of state and local governments to implement local land and water allocation decisions, it would have had to provide a "clear statement" of its intent. *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). No such clear statement can be found in the CWA.

Further, even EPA historically acknowledged that the existence of alternative water supply options was to be considered in determining if the impacts of a particular project were unacceptable. Therefore, EPA impliedly admitted the significance of the local need for such undertakings. However, in this instance, EPA impermissibly changed its course of conduct, offering no reasoned explanation therefore. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

Finally, though deference is normally accorded the decisions of administrative agencies, no such deference is warranted in this situation where (1) one agency is making a determination contrary to the findings of one or more other agencies; and (2) the normal burden of proof is reversed, and is born by EPA. At the very least, the findings of EPA must be the subject of more exacting scrutiny by the reviewing court.

ARGUMENT

I. THIS COURT SHOULD DECIDE WHETHER SECTION 404(c) ALLOWS EPA TO IGNORE AN APPLICANT'S NEEDS AND THE LACK OF ANY PRACTICABLE ALTERNATIVE MEANS OF MEETING SUCH NEEDS

A. This is an Important Federal Question

As indicated by James City County, if EPA can ignore both the need for a public water supply project and the absence of any viable alternatives in vetoing a project, the ability of state and local governments to engage in the construction of necessary public infrastructure projects will be severely undermined. This is contrary to Congressional intent.[5] Section 404(c) of the CWA, 33 U.S.C. § 1344(c) (1986), the very section of the Act utilized by EPA in this instance, calls specifically for the protection of "municipal water supplies" against unacceptable adverse effects. The language of § 404(c) reflects the language of § 102(a), 33 U.S.C. § 1252(a) (1986), which mandates the development, in cooperation with state agencies and municipalities, of comprehensive water pollution control programs with "due regard . . . given to . . . the withdrawal of such waters for public water supply . . . and other purposes." These provisions are, in turn, consistent with the language found in § 101(b) of the Act, 33 U.S.C. § 1251(b) (1986), which recognizes and preserves "the primary responsibilities and rights of States . . . to plan the development and use of land and water resources," and § 510 of the Act,

---

[5]Courts must reject administrative constructions of a statute which are contrary to clear Congressional intent. *Sullivan v. Stroop*, 496 U.S. 478, 493 (1990).

33 U.S.C. § 1370 (1986), which provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." See also 33 U.S.C. § 1251(g) (1986). The Fourth Circuit would, nevertheless, endorse an agency interpretation which allows the impairment of state water allocations and subordinates municipal water supply functions to other values--without even demanding the existence of a viable water supply alternative.

Further, it is a well established maxim that decisions of this nature are to be based on the administrative record as developed before the agencies. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The Fourth Circuit failure to base its decision solely on the administrative record developed during the permitting process is a fatal defect which, if allowed to stand, will severely hinder the exercise of local governmental responsibilities by amici and others who are similarly situated.

Responsible planning demands that projects providing basic public services be permitted well in advance of actual need. In the case of large infrastructure developments by public entities, extensive lead times are involved. An attempt is made to account for both substantial design, engineering and construction periods, as well as the lengthy administrative and judicial review proceedings which often times accompany major undertakings.[6] To

---

[6]The Two Forks process actually began with the formation of the Metropolitan Roundtable and the initiation of the Corps of Engineers' Environmental Impact Statement in 1982, and is now before the Federal District Court for Colorado. The permitting process for the Homestake water supply project of the Cities of Aurora and Colorado Springs began in the early 1980's, with the final permit appeal currently

allow the consideration of "new" non-record evidence developed after close of the administrative record will remove that element of finality which is vital to cost effective and responsible public planning, while depriving public agencies of fundamental fairness.

B. Congress Provided No Clear Statement That EPA Could Ignore Local Needs in the Absence of Viable Alternatives

In order to conclude that EPA had the authority to ignore the local need for a water supply project in the absence of alternatives to meet that need, this Court must find a clear statement by Congress that this was its intent. In *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399-2401 (1991), this Court provided an insightful discussion of the principles of federalism which apply in the instant situation.

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.". . .
>
> . . .

(footnote continued)
pending before the Colorado Court of Appeals.

> Perhaps the principle benefit of the federalist system is a check on abuses of government power. . . . (Emphasis added.)

Id. at 2399-2400. Though acknowledging that "Congress may legislate in areas traditionally regulated by the States," the Court carefully noted that this "is a power that we must assume Congress does not exercise lightly." Id. at 2400. The Court then continued:

> . . . We explained recently: "[I]f Congress intends to alter the 'usual constitutional bounds between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 [105 S.Ct. 3142, 3147, 87 L.Ed.2d 171] (1985); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [104 S.Ct. 900, 907, 79 L.Ed.2d 67] (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). . . . 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' [Citations deleted.]

> This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere. (Emphasis added.)

Id. at 2401.[7] See also, Lawrence Tribe, American Constitutional Law, §§ 5-8 at 316-17 (1988) ("The Supreme Court has invoked the clear statement requirement most notably where a judgment that a federal statute reached to the outer limits of the commerce power would be obviously inconsistent with state institutional interests.")

There is no "plain statement" in the CWA indicating Congressional intent to allow EPA to ignore the pressing infrastructure needs of a local community, or to dictate the use of local land and water resources, thereby usurping the local planning function. In fact, §§ 101, 102, and 510 of the Act, 33 U.S.C. §§ 1251, 1252, and 1370 (1986 & Supp. 1994), as referenced above, constitute a plain statement against such federal interference.

---

[7] See also *Illinois Central R.R. v. Public Utilities Comm'n of Illinois*, 245 U.S. 493, 510 (1918) ("in construing federal statues enacted under the power conferred by the Commerce Clause of the Constitution, it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (where Congress legislates in a field which the states have traditionally occupied, one must "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

C. EPA Must Adhere to Longstanding Policies

As noted in the Petition of James City County, EPA had a long standing policy to "take into account the fact that the alternative sites or methods are or are not available, so that the loss of resources is avoidable or unavoidable." 44 Fed. Reg. 5876, 5878 (1979). This is only logical in view of the competing interests that are being balanced. However, in the case of James City County, EPA departed from that policy without providing a "reasoned analysis" therefore. This is impermissible. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Ohio v. EPA*, 997 F.2d 1520, 1542 (D.C. Cir. 1993) (EPA must offer a "reasoned explanation," and not a "general cursory explanation" for any significant change in policy). In addition, as also noted by James City County, the Fourth Circuit erred in accepting EPA's "new" regulatory interpretation. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). To allow such actions to stand would run contrary to existing law, and would place public entities in the unenviable position of facing yet additional uncertainty in the permitting process.

II. COURTS NEED NOT DEFER TO FEDERAL AGENCY FINDINGS UNDER SUCH CIRCUMSTANCES

The present action, though based upon an administrative record, does not call for the "presumption of regularity" which would normally be the case. First, deference should not be given to EPA's findings when they are contrary to the findings of other agencies with overlapping jurisdiction. In addition, by the EPA's own admission, it bears a burden of proof to support its

findings. Hence, minimal deference is due the EPA under such circumstances.

A. Minimal Deference Is Due the EPA Determination

As noted above, this is a proceeding where one federal agency, EPA, has made a determination contrary to the conclusions reached by another federal agency, the Corps of Engineers. Hence, though agency action is ordinarily entitled to a presumption of regulatory, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), and the factual findings of an agency usually are given deference, *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980), such should not be the case in this instance. To the extent this Court would defer to the findings of EPA, it would be disregarding the findings of the Corps. According to Professor Bernard Schwartz, "[i]f the interpretation of the administrative expert whose act is being reviewed is contradicted by that of other administrators, the reviewing court should decide the question for itself." B. Schwartz, Administrative Law § 10.35 at 664 (2nd Ed. 1984).[8] See also, *General Electric Co. v. Gilbert*, 429 U.S. 125, 144-45 (1976) and *Barnard v. Carey*, 60 F. Supp. 539 (N.D. Ohio 1945).

B. EPA Bears the Burden of Proof

The fact that the initial burden of proof in a veto scenario lies with EPA further demonstrates that the normal deference to agency action is not appropriate in

---

[8]It should be noted that the Second Circuit did not give deference to EPA in a similar situation. *Bersani v. Robichaud*, 850 F.2d 36, 45 (2nd Cir. 1988).

the review of a Section 404(c) decision. The nature of EPA's responsibility is identified in Section 404(c) of the Act, 33 U.S.C. § 1344(c) (1986), which provides in part:

> The Administrator is authorized . . . to deny or restrict the use of any defined area for specification . . . as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse impact on municipal water supplies, shellfish beds and fishery areas, . . . wildlife, or recreational areas. . . . The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection. (Emphasis added).

Thus, EPA must prove that the activity under review "*will*" have an unacceptable adverse effect, *James City County, Virginia v. EPA*, 955 F.2d 254, 257 (4th Cir. 1992). EPA carries the burden of proof upon this issue.[9]

EPA's acknowledgement of its burden of proof with respect to the unacceptability of a proposed discharge of dredged or fill material was reaffirmed in the preamble to EPA's § 404(b)(1) Guidelines. EPA stated therein that "[i]f the Administrator uses his § 404(c) 'veto', then *he does have the burden to justify his action*. . . ." Guidelines for Specification of Disposal Sites for Dredged or Fill

---

[9]This is a burden which should not be easily surmounted, for the Corps, in issuing its Notice of Intent to permit, has already determined that applicants have overcome their burden relative to certain presumptions against permitting a project. See Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, (33 U.S.C. § 1344(b)(1)), 40 C.F.R. §§ 230.1(c), 230.10(a)(3) (1990).

Material, 45 Fed. Reg. 85336, at 85338 (1980). See also, 44 Fed. Reg. 58076, at 58080 (1979), *Bersani v. Robichaud*, 850 F.2d 36, 40 (2nd Cir. 1988), cert. denied 489 U.S. 1089 (1989) ("the burden of proving that the discharge will have an 'unacceptable adverse effect' is on EPA.").[10] Hence, EPA must come forward with sufficient evidence, not mere conclusory statements, to support its position. See, *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989); 5 U.S.C. § 556(d) (1982).

C. EPA's Decision Merits an Especially Close Examination

It is fundamental that the courts are to undertake a "searching and careful" examination of the factors relied upon by the agency. *Citizens to Preserve Overton Park*, 401 U.S. at 416. However, in the unique circumstances of this case, that examination should be particularly exhaustive. The determination of EPA Headquarters to exercise its § 404(c) veto authority was a reversal of the Corps and state water quality decisions. When such different conclusions have been reached by reviewing authorities, "the court subjects the record to particular scrutiny." *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986). Such scrutiny must be demanded in this instance.

---

[10]In determining whether the discharge will have an unacceptable adverse effect, the regulations implementing § 404(c) of the Clean Water Act require the Administrator to "take into account all the information available to him, including any written determination of compliance with the § 404(b)(1) Guidelines made in 40 C.F.R. Part 230. . . ." 40 C.F.R. § 231.1(a) (1993).

CONCLUSION

For the foregoing reasons, the petition of James City County for a writ of certiorari should be granted.

Respectfully submitted,

MARK T. PIFHER
Counsel of Record
ANDERSON, GIANUNZIO, DUDE, PIFHER & LEBEL, P.C.
104 S. Cascade Ave. # 204
Colorado Springs, CO 80901
(719) 632-3545

Attorney for *Amicus* City of Colorado Springs

MARCIA M. HUGHES
MARCIA M. HUGHES, P.C.
390 Union Blvd., # 415
Lakewood, CO 80229
(303) 980-8668

Attorney for *Amici* The Metropolitan Water Providers and the Metropolitan Water Participants

August 22, 1994

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
AUG 22 1994
OFFICE OF THE CLERK

No. 93-2045

In the

Supreme Court of the United States

October Term, 1994

JAMES CITY COUNTY, VIRGINIA,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and UNITED STATES ARMY CORPS OF ENGINEERS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, JAMES CITY COUNTY, VIRGINIA

RONALD A. ZUMBRUN
* ROBIN L. RIVETT
GERALYNN PATELLARO
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLES OF AUTHORITIES CITED iii

INTEREST OF AMICUS CURIAE 1

OPINION BELOW 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. PROHIBITING A COUNTY FROM MAINTAINING ITS WATER SUPPLY HAS SIGNIFICANT PRACTICAL CONSEQUENCES BECAUSE WATER IS ITS LIFEBLOOD 5

II. THIS CASE PRESENTS IMPORTANT ISSUES OF FEDERAL LAW BECAUSE THE FOURTH CIRCUIT'S RULING UPHOLDS EPA'S ARBITRARY AND CAPRICIOUS ACTIONS 7

A. EPA Regulations Provide Clear Guidelines for the Agency To Follow in Determining if a Section 404 Permit Should Be Vetoed 8

B. EPA Did Not Consider All Relevant Factors, as Required by Its Own Guidelines, in Vetoing the Ware Creek Project 10

Page

C. Without Justification or Notice, EPA Abandoned Its Long-Standing Policy of Considering All Relevant Factors as Part of the Section 404(c) Veto Process 12

III. EPA'S ACTIONS ARE CONTRARY TO THE CONGRESSIONAL INTENT BEHIND THE CWA WHICH PROTECTS STATES' RIGHTS TO DEVELOP AND USE LAND AND WATER RESOURCES 15

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

CASES

Alameda Water & Sanitation District v. Reilly, No. Civ. A. 91-M-2047 (D. Colo. 1993) 15

Bersani v. Robichand, 850 F.2d 36 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989) 12

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 8

Dolan v. City of Tigard, 512 U.S. ___, 62 U.S.L.W. 4576 (1994) 2

Euclid v. Ambler Realty Co, 272 U.S. 365 (1926) 16

Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) 14-15

Lucas v. South Carolina Coastal Council, 505 U.S. ___, 120 L. Ed. 2d 798 (1992) 2

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 8

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 17

Page

Natural Resources Defense Council, Inc. v. Securities and Exchange Commission, 606 F.2d 1031 (D.C. Cir. 1979) 13-14

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 17

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 2

STATUTES

5 U.S.C. § 706(2)(A) 7-8

33 U.S.C. § 1251, et seq. 2

§ 1251(a) 16

§ 1251(b) 16

§ 1251(g) 16-17

§ 1344(c) 3,8

RULES AND REGULATIONS

33 C.F.R. § 320.4(m) 4,16

40 C.F.R. § 230.10(a) 3,9

§ 230.10(a)(2) 3,9

§ 230.30 9

Page

§ 230.50 9

§ 230.60 9

§ 230.70 9

§ 231, et seq. 8

§ 231.1(a) 9-10

§ 231.2(e) 9

Supreme Court Rules, Rule 10.1 5

Rule 37 1

MISCELLANEOUS

George A. Gould and Frank J. Trelease, Water Law (1986) . . . 5-6

Jonathan Tolman, Attack of the Wetland Enforcers, Wall St. J. (July 18, 1994) 18

Frank J. Trelease, A Water Management Law for Arkansas, 6 U. Ark. L. Rev. 369 (1983) 5-6

S. Rep. No. 92-1236, 92d Cong. 2d Sess., reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 (Jan. 1973) 9-10

United States Army Corps of Engineers, Analysis of the Proposed Discharge with Respect to Section 404(b)(1) of the Clean Water Act (July 11, 1988) 11

No. 93-2045

In the

Supreme Court of the United States

October Term, 1994

JAMES CITY COUNTY, VIRGINIA,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and
UNITED STATES ARMY CORPS OF ENGINEERS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, JAMES CITY COUNTY, VIRGINIA

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, James City County. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has litigated numerous public interest cases which involve environmental issues in general and the interpretation of the Clean Water Act (CWA) (33 U.S.C. § 1251, *et seq.*) in particular. *See, e.g., United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), where PLF participated as amicus curiae. Other cases in which PLF has participated before the United States Supreme Court include *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where its attorneys were counsel of record; and more recently *Dolan v. City of Tigard*, 512 U.S. ___, 62 U.S.L.W. 4576 (1994), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992), where PLF participated as amicus curiae. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support and societal impacts are significant. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks to augment the argument in the James City County petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of property rights and balanced environmental regulation will provide an additional viewpoint with respect to the constitutional and legal issues presented.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at *James City County v. Environmental Protection Agency*, 12 F.3d 1330 (4th Cir. 1993).

STATEMENT OF THE CASE

James City County, Virginia, is running out of water. Over 15 years ago the county determined that severe water shortages were inevitable and it would not have sufficient resources to meet demands of the 21st century. James City County later applied to the Army Corps of Engineers (Corps) for a permit, under Section 404(b) of the CWA, to construct a dam and reservoir across Ware Creek within the county. After thorough evaluation of all available alternatives, local, state, and federal agencies determined that only one adequate water source would be capable of supplying future needs. The Corps proposed to grant the permit in 1988 after receiving certification from the Virginia State Water Control Board that the project would not violate state water quality standards. The Environmental Protection Agency (EPA) blocked permit issuance, however, pursuant to its authority under Section 404(c) of the CWA, claiming that the project would have "unacceptable adverse effects" on the environment because the county had practicable alternatives to building the dam.[1] The county won a summary judgment against EPA in the Federal District Court for the Eastern District of Virginia. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's holding, finding that EPA's claim of practicable

---

[1] Section 404(c) reads in pertinent part that EPA can veto a project if "the discharge ... will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ..., wildlife, or recreational areas." 33 U.S.C. § 1344(c). Additionally, EPA must consider practicable alternatives to the proposed discharge which might have less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2).

alternatives was unsupported by the evidence. Nevertheless, the appellate court remanded the case to afford EPA an opportunity to decide whether the adverse environmental impacts of the project would be "unacceptable" even though no practicable alternative was available.

On remand to the District Court, EPA argued it had the authority to veto Corps permits solely by considering the adverse effects on the environment. In response, the county asserted that EPA was required to consider a wide range of factors in determining what was "unacceptable." This included EPA's past practice of reviewing the project's importance to the local water supply and whether practicable alternatives existed. The District Court once again ruled for the county, noting EPA "completely ignore[d] ... the [c]ounty's desperate need for water." *James City County v. Environmental Protection Agency*, 23 ENVTL. L. REP. 20,228, 20,229 (1992). The Fourth Circuit Court of Appeals reversed, however, entering judgment on December 30, 1993. The court held that while the Corps must consider all relevant factors, EPA's "authority to veto to protect the environment is practically unadorned." *James City County v. Environmental Protection Agency*, 12 F.3d at 1336.

James City County's petition to the Fourth Circuit for a Rehearing and Suggestion for Rehearing In Banc was denied on March 25, 1994. The petition for writ of certiorari followed on June 22, 1994. The county has no other options. It needs water.

SUMMARY OF ARGUMENT

A community's water supply is its lifeblood. "Water is an essential resource, basic to human survival, economic growth, and the natural environment." 33 C.F.R. § 320.4(m). In the EPA's eagerness to clean up the nation's waters, however, it has lost

sight of balancing the importance of protecting clean water with providing life sustaining water.

The Fourth Circuit's ruling allows EPA to exalt certain environmental effects over all other considerations, sentencing James City County to a certain doom. This is contrary to (1) EPA's own specific regulations and long-standing procedures which call for weighing all available information, resulting in a violation of the Administrative Procedure Act (APA) and (2) congressional intent of the CWA.

EPA's self-expanded and inconsistent interpretation of its veto power over a community's water supply will have frightening implications nationwide. Such a result cannot be condoned by this Court. Thus, pursuant to Supreme Court Rule 10.1, this case represents important issues of federal law resulting in significant practical consequences which warrant this Court's review.

ARGUMENT

I

PROHIBITING A COUNTY FROM MAINTAINING ITS WATER SUPPLY HAS SIGNIFICANT PRACTICAL CONSEQUENCES BECAUSE WATER IS ITS LIFEBLOOD

It is undisputed that water is the lifeblood of any community. Professor Frank Trelease, a renowned water law expert, once commented:

> "People benefit from water use or nonuse. Law is man's creation; law should serve man, not things or governments. If the law is to be comprehensive it must, of course, protect the resources and promote the public good, but it is *people* who want to preserve the

> natural features of lakes and streams; it is *people* whose farms and factories contribute not only profit to them but prosperity to the state, and it is *people* who make up the population of cities."

George A. Gould and Frank J. Trelease, *Water Law* at 11 (1986) (citing Frank Trelease, *A Water Management Law for Arkansas*, 6 U. ARK. L. REV. 369, 371-72 (1983) (emphasis in original).

Comprehensive laws, like the CWA, that protect water resources are designed and should be employed to promote the overall public good. This instant case, however, demonstrates how the CWA has been interpreted by EPA and the Court of Appeals to serve fish and wildlife regardless of the needs of the *people*.

James City County is running out of water. According to a Corps District Engineer, "the consequences of not developing a reliable water supply ... are too dangerous and damaging to contemplate as an alternative." Record of Decision, 84-0614-06, July 11, 1988, *reprinted in* Petition for Writ of Certiorari (Petition) at A-3. The engineer also indicated that if a water project is not commenced soon, evidence suggests that by 1999 the area could face a "potential disastrous [water] system failure." *Id.* The practical consequences of such a disaster are devastating.[2]

---

[2] As stated in the initial District Court opinion, James City County is the second fastest growing county in Virginia. *James City County v. United States EPA*, 758 F. Supp. 348, 349 (E.D. Va. 1990). Consequently, the county has projected a need of at least 10.5 million more gallons of water per day if it is to meet water demands through the year 2030. *Id.* For obvious reasons, if not met, this demand will have major social impacts on the community. Economic impacts will also be staggering because

(continued...)

Despite these consequences, the Fourth Circuit opinion held that Congress intended EPA's veto authority to be "practically unadorned." *James City County v. Environmental Protection Agency*, 12 F.3d at 1336. The ruling portrays EPA as the ultimate protector due to its focus on environmental concerns. The citizens of James City County, however, will certainly not view the decision that way once they have no more water. It is not an understatement to conclude that EPA could wipe out entire communities by completely controlling municipal water supplies.

This extraordinary holding virtually allows EPA unfettered discretion in assessing Section 404 permit applications. If the judgment is allowed to stand, EPA will have no obligation to consider the significant practical consequences of its Section 404 decisions.

II

THIS CASE PRESENTS IMPORTANT ISSUES OF FEDERAL LAW BECAUSE THE FOURTH CIRCUIT'S RULING UPHOLDS EPA'S ARBITRARY AND CAPRICIOUS ACTIONS

Courts must set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because such action violates the APA. 5 U.S.C.

---

[2] (...continued)
the county's "Master Water Plan states that major commercial and industrial customers account for approximately 70 percent of the County's 1985 water demand." Final Determination of the U.S. Environmental Protection Agency's Assistant Administrator for Water Pursuant to Section 404(C) of the Clean Water Act Concerning the Proposed Ware Creek Water Supply Impoundment James City County, Virginia, July 10, 1989, *reprinted in* Petition at D-74.

§ 706(2)(A). To find that an agency's action is arbitrary and capricious,

> the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. [Citations omitted.] Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). *See also Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Therefore, this Court should ensure that EPA's analysis of unacceptable adverse effects includes consideration of all relevant factors.

A. EPA Regulations Provide Clear Guidelines for the Agency To Follow in Determining if a Section 404 Permit Should Be Vetoed

EPA has authority to veto Section 404 permits if the "discharge of ... materials into [an] area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ..., wildlife, or recreational areas. Before making such determination, the [EPA] Administrator shall consult with the [Corps] Secretary." 33 U.S.C. § 1344(c).

Accordingly, EPA's own regulations provide the relevant factors it must consider when determining if a project will have unacceptable adverse effects on the environment, justifying a Section 404 veto. 40 C.F.R. § 231, *et seq.* Pursuant to these regulations, "[i]n evaluating the unacceptability of such impacts,

consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 CFR Part 230)." 40 C.F.R. § 231.2(e). The 404(b)(1) guidelines read in pertinent part, that "no ... fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). Moreover,

> [i]n making this determination [to veto a project], the [EPA] Administrator will take into account all information available to him, including any written determination of compliance with the section 404(b)(1) Guidelines made in 40 CFR Part 230, and will consult with the Chief of Engineers or with the state.

40 C.F.R. § 231.1(a).[3]

The above guidelines clearly indicate that veto decisions are not to be made in a vacuum. EPA has an obligation to consider all available information. This requirement is further underscored by a review of CWA's legislative history which declares that

> [v]irtually every action required of the Administrator by the [CWA] ... involves some degree of agency discretion, *judgments involving a complex balancing of*

---

[3] EPA guidelines at 40 C.F.R. address several other factors including minimizing adverse effects on the environment (Section 230.70), evaluating material to be discharged (Section 230.60), the effect on endangered species (Section 230.30), and the effect on municipal water supplies (Section 230.50).

> *factors* that include technological considerations, economic considerations, and others.

S. REP. NO. 92-1236, 92d Cong. 2d Sess., *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, Vol. 1, at 332 (Jan. 1973) (emphasis added).

Thus, EPA has articulated standards, in accordance with the APA and congressional intent, requiring it to consider all information available, including practicable alternatives, before vetoing a Section 404 permit.

B. EPA Did Not Consider All Relevant Factors, as Required by Its Own Guidelines, in Vetoing the Ware Creek Project

EPA's own rules require it to evaluate myriad factors, including all available information when making a veto decision. 40 C.F.R. § 231.1(a). It is axiomatic, therefore, that when determining the fate of the Ware Creek project, EPA should have considered the critical importance of the county's dwindling water supply and that no practicable alternatives existed. It refused to do so, however.

Of course the Corps District Engineer did factor in this concern when he concluded,

> [w]ere it not for the overpowering need for the project and the lack of practicable alternatives, I could not justify this project as being in the public interest. The *need cannot be overlooked* by any responsible party, though, and the evidence concerning the lack of practicable alternatives is overwhelming.

Record of Decision, 84-0614-06, July 11, 1988, *reprinted in* Petition at A-3-4 (emphasis added).

In support of his conclusion, the engineer also noted that significant mitigation measures would substantially reduce the projected adverse effects because "an impressive effort has been made to avoid, minimize and compensate for these wetland losses, to the extent that the net loss has been reduced so as not to cause a significant degradation to the water of the United States." *Id.* at 1.

Further, he determined:

> There [was] no evidence whatever that this project would: (1) cause or contribute to violations of any State water quality standards ..., (2) violate any toxic effluent standard, (3) jeopardize any threatened or endangered species, or (4) affect any marine sanctuaries.

United States Army Corps of Engineers, *Analysis of the Proposed Discharge with Respect to Section 404 (b)(1) of the Clean Water Act* (July 11, 1988), *reprinted in* Petition at B-10.

Yet the Fourth Circuit held only the Corps responsible for considering all factors in the Corps' "public interest review." *James City County v. EPA*, 12 F.3d at 1336. It determined that "Congress gave the final decision whether to permit a project to [EPA]" and that EPA need only consider matters of water purity. *Id.* The Fourth Circuit explained its conclusion only by stating "[EPA's] authority to veto to protect the environment is practically unadorned." *Id.*

Basically, EPA can now veto a project solely based on anticipated environmental harm, to the exclusion of all other factors. The Fourth Circuit is blatantly disregarding congressional intent and EPA's own established standards that require the agency to weigh carefully all relevant factors. This Court has the opportunity to instruct EPA that the checks and balances provided

by Congress in the Section 404 permit process must not be ignored.

C. Without Justification or Notice, EPA Abandoned Its Long-Standing Policy of Considering All Relevant Factors as Part of the Section 404(c) Veto Process

In the past EPA has indeed considered more factors than solely the environmental harm of a project. For example, in *Bersani v. Robichand*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989), EPA vetoed the construction of a mall based on the existence of practicable alternatives. *Id.* at 38.

No better example can be found, however, than in this case when even EPA acknowledged that it "reasonably determined that the 'acceptability' of adverse effects on the environment can best be evaluated in light of *all relevant factors*." Reply Memorandum in Support of Defendants' Motion for Summary Judgment (Sept. 14, 1990), Court Record (CR) 37 at 2-3, *reprinted in* Petition at 11 (emphasis added). Moreover, EPA later reinforced its position by admitting that

> [t]he statutory term "unacceptable" must certainly authorize the Agency to *consider* and *balance* a wide variety of pertinent factors, including the scope and severity of a project's environmental effects in light of the benefits to be obtained from it.

Reply Brief for Appellants EPA and Corps of Engineers (May 16, 1991), filed in *James City County v. EPA*, No. 91-2612 (4th Cir. 1992), *reprinted in* Petition at 13 (emphasis added).

These statements indicate that consideration of James City County's water supply should have been one of the pertinent factors to be balanced in EPA's decision making process.

Yet EPA had the temerity to later claim on remand before the District Court that it had absolutely no obligation to consider James City County's water needs. *James City County v. EPA*, Civ. Action No. 89-156-NN. Transcript (July 28, 1992), CR 72 at 31, *reprinted in* Petition at 15. This complete reversal of position is indicative of EPA's disregard for its own regulations as written and its own long-standing interpretation of those regulations.

EPA may claim that the interpretation of its Section 404 permit veto power is entitled to a presumption of validity based on this Court's general deference to agency actions. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). However, heightened scrutiny is warranted

> where an agency has a history of "ad hoc and inconsistent judgments" on a particular question; where the agency has arrived at an identical result after remand from a reviewing court for further explanation of reasons; or when an agency has departed from its consistent and long-standing precedents or policies.

Natural Resources Defense Council, Inc. v. Securities and Exchange Commission, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979) (citations omitted).

Applying these standards, the instant case does not merit deference to EPA's position, rather it deserves more exacting scrutiny. The record clearly demonstrates that (1) EPA's application of its veto power has been inconsistent, (2) EPA reached the identical conclusion after remand from the appellate court, and (3) EPA has departed from its long-standing precedent.

Amicus acknowledges that

> [a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (citations omitted).

In *James City County* EPA has switched gears with no justification or reasoned analysis whatsoever. Indeed, EPA has ignored its own well-established and self-proclaimed policy of balancing relevant factors. *Supra* at 12. Even the District Court noted on remand that

> [w]hile the EPA provides reams of environmental analysis, it neglects its duty to consider all of the factors important to this project's acceptability or unacceptability -- namely the county's need for water, a need which it previously stated it should and would consider.

James City County v. EPA, 23 ENVTL. L. REP. 20,288, 20,299, *reprinted in* Petition at H-3-4. Because EPA has not articulated any rationale for its abrupt policy change, its actions are arbitrary and capricious and should therefore be set aside. *Natural Resources Defense Council, Inc.*, 606 F.2d at 1049.

Moreover, this Court needs to stop EPA's *unpredictable* veto process.

> The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance. This collaborative spirit does not undercut, it rather underlines the court's rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of evenhanded application of law, rather than impermissible whim, improper influence, or misplaced zeal.

Greater Boston, 444 F.2d at 852.

James City County and myriad other project applicants have too much at stake to fall victim to EPA's whims and erratic assessments.[4] This Court can provide the needed guidance for petitioner and future applicants who are today faced with terrifying uncertainty due to EPA's inconsistent implementation of the CWA.

III

EPA'S ACTIONS ARE CONTRARY TO THE CONGRESSIONAL INTENT BEHIND THE CWA WHICH PROTECTS STATES' RIGHTS TO DEVELOP AND USE LAND AND WATER RESOURCES

If the Fourth Circuit's decision is permitted to stand, local government will find that the "practically unadorned" veto power of EPA will allow it to control municipal water supplies. In turn it will also control local land use and community growth because

---

[4] For example, traditional state water rights and an EPA veto of a local water project are the subject of current litigation in *Alameda Water & Sanitation District v. Reilly*, No. Civ. A. 91-M-2047) (D. Colo. 1993).

"[w]ater is an essential resource, basic to human survival, economic growth, and the natural environment." 33 C.F.R. § 320.4(m). Land use decisions, however, are within the inherent police power of the states. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Therefore, the opinion inappropriately confers upon EPA authority which belongs to the state and local agencies.

Land use planning was not the intent of Congress in adopting the CWA, whose objective simply was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In fact, Congress specifically addressed the policy concern over local water and land use decisions in the CWA which reads in pertinent part:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of *land* and *water* resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (emphasis added).

Furthermore:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to

> prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g).

These statutes illustrate that congressional policy dictates a cooperative approach to the CWA and that Congress did not grant EPA unfettered discretion over water quantity and quality decisions that would ultimately result in local land use control. Rather, "where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation." *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985). This accommodation reasonably should include balancing all relevant factors when assessing a project subject to Section 404.

It is indisputable that "dams are a major component of state water management, providing irrigation, drinking water, flood protection etc." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 182 (D.C. Cir. 1982). "[S]pecific indication [exists] in [CWA] that Congress did not want to interfere any more than necessary with state water management." *Id.* Congress did not intend for the management of local water resources to be left to EPA's "practically unadorned" discretion under Section 404. Quite the contrary, Congress intended that federal agencies would cooperate with local and state agencies in fulfilling CWA's goals for large and small projects alike. Yet, the Fourth Circuit's ruling hardly reflects a cooperative approach to the CWA. It instead allows EPA to control local land use and water resource decisions without considering the real consequences of its action--a complete interference with state water management.[5]

---

[5] Thousands of examples exist on a smaller scale to demonstrate the out of balance regulation currently holding local land use authorities and Section 404 permit applicants hostage, which was

(continued...)

In fact, "EPA and its enforcers have been treating wetland regulation as an environmental crisis." Jonathan Tolman, *Attack of the Wetland Enforcers*, WALL ST. J. at A12. Amicus certainly acknowledges the importance and value of wetlands. Yet "[t]he current regulations, as interpreted by the Army Corps of Engineers, tend to treat every wetland as if it were a national treasure" even though

> "[i]n 1994, the government's top three wetland restoration programs will restore a combined total of 157,000 acres of wetlands. At the same time, data from the government's National Resource Inventory concluded that the U.S. will convert only 66,000 acres of wetlands to other uses. In other words, by the end of 1994 there should be tens of thousands more acres of wetlands than there were at the beginning.

Id. The above figures reflect that "draconian command-and-control wetland regulations are no longer necessary." *Id.* Congress has spoken; a balanced approach to the CWA was and is still its intent. Therefore, this Court should reestablish the balanced approach intended by Congress and require EPA to

---

[5] (...continued)
not the intent of Congress. One such example occurred in Washington state:

> During his three-year wait for a permit, [the applicant] gave one of his U.S. senators a tour of his property in an attempt to explain his problem. At one point during the tour the senator asked how long it would take them to get to the wetland. [The applicant] replied, "You're standing in it."

Jonathan Tolman, *Attack of the Wetland Enforcers*, WALL ST. J. at A12 (July 18, 1994).

consider all relevant information and factors when considering the propriety of a Section 404 permit, particularly when a community's lifeblood is at stake.

CONCLUSION

For the reasons stated above, this case represents important issues of federal law with significant practical consequences which warrant this Court's review. Therefore, amicus respectfully requests that this Court grant James City County's petition for writ of certiorari.

DATED: August, 1994.

Respectfully submitted,

RONALD A. ZUMBRUN
* ROBIN L. RIVETT
GERALYNN PATELLARO
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae